

ORIGINAL

FILED

07 DEC 21 PM 3: 25

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

99/8

DEPUTY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

VITALIY KAGANOVICH,
[A71-243-964]

Petitioner,

v.

MICHAEL CHERTOFF, SECRETARY
OF THE DEPARTMENT OF
HOMELAND SECURITY, MICHAEL
MUKASEY, ATTORNEY GENERAL,
ROBIN F. BAKER, DIRECTOR OF SAN
DIEGO FIELD OFFICE, U.S.
IMMIGRATION AND CUSTOMS
ENFORCEMENT, JOHN A. GARZON,
OFFICER-IN-CHARGE,

Respondents.

Civil Action No.

'07 CV 2403 JAH AJB

DECLARATION OF JANET TUNG IN
SUPPORT OF THE
PETITIONER'S MOTIONS

I, Janet Tung, hereby declare:

1. I am an attorney duly licensed to practice law in the State of California, in the United States District Courts for the Southern, Eastern, and Northern Districts of California, and in the United States Court of Appeals for the Ninth Circuit.

2. I am an employee of Federal Defenders of San Diego, Inc. Federal Defenders of San Diego, Inc., is ready and able to assist this petitioner in his petition for writ of habeas corpus.

3. In my capacity as an employee of the Federal Defenders of San Diego, Inc., I am assisting the petitioner, Vitaliy Kaganovich, in securing his release from the custody of federal immigration officials, and in filing a petition for a writ of habeas corpus in the United States District Court for the Southern District of California.

///

///

1 4. As an employee of Federal Defenders of San Diego, Inc., I monitor indefinite detainee
2 litigation in other Ninth Circuit districts, and maintain contact with other federal defender offices involved
3 with this litigation.

4 5. The Federal Defenders of San Diego, Inc. currently assists, represents, and/or is preparing
5 to initiate habeas proceedings on behalf of individuals in the Southern District of California, who are non-
6 removable aliens and continue to be detained by the Department of Homeland Security despite the expiration
7 of the 180-day post-order removal period set forth under Zadvydas v. Davis, 533 U.S. 678, 701 (2001).

8 6. As of the filing of this declaration, our office represents others that have been ordered
9 deported and that remain in the detention of the respondents beyond the 180-day post-order removal period
10 that is considered presumptively reasonable in Zadvydas. By way of example, our office represented Ahmed
11 El-Bashir Mustafa, Case No. 07CV480 WQH (POR), who had been in immigration custody and subject to
12 a final order of removal since July 22, 2006, awaiting removal to Sudan.

13 7. In light of the respondents' continued detention of deportable aliens beyond the 180-day
14 post-order removal period proscribed in Zadvydas, the United States District Court for the Southern District
15 of California has consistently appointed Federal Defenders of San Diego, Inc. to assist petitioners in their
16 efforts to challenge their continued detention in immigration custody in violation of federal law. See Order
17 to Show Cause as to Why the Petition For Writ of Habeas Corpus Should Not be Granted and Order Granting
18 Motion for Appointment of Counsel, Mustafa v. Chertoff, et al., Case No. 07CV480 WQH (POR) (S.D. Cal.
19 May 1, 2007) (attached hereto as Appendix A); Order (1) Granting Petitioner's Motion for Appointment of
20 Counsel; (2) Granting Petitioner *In Forma Pauperis* Status; and (3) Directing Respondents to Show Cause,
21 Baltayan v. Chertoff, et al., Case No. 06CV0305-IEG (BLM) (S.D. Cal. Feb. 15, 2006) (attached hereto as
22 Appendix B); see also Order Granting Motion for Appointment of Counsel, Casas-Castrillon v. Dept. of
23 Homeland Security, Case No. 05CV1552-BEN (NLS) (S.D. Cal. Jan. 31, 2006) (attached hereto as Appendix
24 C); see also Order Granting Request for Appointment of Counsel, Suarez-Torres v. Chertoff, et al., Case No.
25 06CV1444-W (WMC) (S.D. Cal. Aug. 8, 2006) (attached hereto as Appendix D).

26 8. Mr. Kaganovich is one of several non-removable aliens currently in the respondents' custody
27 in the Southern District of California whom Federal Defenders of San Diego, Inc. is assisting in challenging
28 the lawfulness of detention subsequent to the expiration of the 180-day post-order removal period.

1 9. I have spoken and corresponded with Mr. Kaganovich in an effort to assist him in securing
2 his release from custody of the respondents. After conferring with Mr. Kaganovich, I concluded that a petition
3 for a writ of habeas corpus should be filed on his behalf, pursuant to 28 U.S.C. § 2241.

4 10. Based on my discussions with Mr. Kaganovich, I am informed and believe that a federal
5 immigration judge ordered him removed to the Ukraine on July 30, 2002; the Board of Immigration Appeals
6 (BIA) affirmed the decision on January 15, 2004; and the Ninth Circuit denied his petition for review on
7 December 12, 2006 and issued mandate on February 5, 2007, transferring jurisdiction back to the
8 Respondents, over ten months ago. The removal order became administratively final on January 15, 2004.
9 See 8 C.F.R. § 1241.1(a) (circumstances under which order of immigration judge becomes final).
10 Mr. Kaganovich's removal period commenced at least as of February 5, 2007. See 8 U.S.C.
11 § 1231(a)(1)(B)(ii) ("The removal period begins on the latest of the following: . . . If the removal order is
12 judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court's final order.").

13 11. I am informed and believe that Mr. Kaganovich most recently entered respondents' custody
14 on February 8, 2007, and has remained in detention since then. He has therefore been in respondents'
15 continuous custody for over ten months as of the date of this declaration.

16 12. Mr. Kaganovich is currently detained by the respondents at the ICE San Diego Detention
17 Facility, in the Southern District of California. The 180-day post-order removal detention period enunciated
18 by the Supreme Court in Zadvydas expired on or about **August 8, 2007**.

19 13. I am informed and believe Mr. Kaganovich a native of the Ukraine born in the former
20 Soviet Union in 1970.

21 14. I am informed and believe Mr. Kaganovich came to the United States in 1994, as a refugee,
22 and later became a lawful permanent resident in 1995.

23 15. I am informed and believe that Mr. Kaganovich filed a motion to reopen the removal
24 proceedings. At that time, the stay of removal he had previously obtained from the Ninth Circuit was no
25 longer in effect, and Mr. Kaganovich did not seek an administrative stay of removal. Mr. Kaganovich's
26 motion to reopen, which was denied on July 20, 2007, had no effect on the time period for removal. 8 C.F.R.
27 § 241.4(b)(1) ("An alien who has filed a motion to reopen immigration proceedings for consideration of relief
28

1 from removal . . . shall remain subject to the provisions of this section [requiring a custody determination after
2 90 days, and HQPDU review after 180 days] unless the motion to reopen is granted.”).

3 16. I am informed and believe Mr. Kaganovich has no legal education, training, or background
4 in the United States or any other country.

5 17. I am informed and believe that Mr. Kaganovich has limited financial resources and is
6 unable to afford to hire an attorney to represent him in this matter. The current balance in his custody trust
7 account is less than \$150. See Prison Certificate attached to accompanying Motion for Appointment of
8 Counsel. Since he is in custody, he does not have a source of income or employment. Mr. Kaganovich was
9 self-employed as a limo driver before he was taken into custody. His monthly earnings were approximately
10 \$2,000, which terminated in February 2007 due to his prolonged detention. He has approximately \$90.00 is
11 a checking account, has no savings or other financial accounts, and does not own an automobile.
12 Mr. Kaganovich has only approximately \$1,000 of equity in the home that he and his wife share. As a result,
13 he cannot afford to retain counsel.

14
15
16 I certify under the laws of the State of California that the foregoing is true and correct.
17 Executed in San Diego, California on December 21, 2007.

18
19
20 
21 JANET TUNG
22 Declarant
23
24
25
26
27
28

APPENDIX A

1
2
3
4
5
6
7
8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
10

11 AHMED EL-BASHIR MUSTAFA,

12 Petitioner,

13 vs.

14 MICHAEL CHERTOFF, SECRETARY OF
15 THE DEPARTMENT OF HOMELAND
SECURITY, et al.,

16 Respondents.
17

CASE NO. 07CV480 WQH (POR)

ORDER TO SHOW CAUSE AS TO
WHY THE PETITION FOR WRIT OF
HABEAS CORPUS SHOULD NOT
BE GRANTED AND ORDER
GRANTING MOTION FOR
APPOINTMENT OF COUNSEL

18 HAYES, Judge:

19 Pending before the Court are Petitioner Ahmed El-Bashir Mustafa's Petition for Writ of
20 Habeas Corpus pursuant to 28 U.S.C. § 2241 (Doc. # 1) and motion for appointment of counsel
21 pursuant to 18 U.S.C. § 3006A(a)(2)(B). (Docs. # 3, 1-2). Petitioner, who has been subject to a final
22 order of removal since July 22, 2006, alleges that his continued and indefinite detention is unlawful
23 because he has been detained beyond the presumptively reasonable period of six months and there is
24 no significant likelihood of removal in the reasonably foreseeable future. *See Zadvydas v. Davis*, 533
25 U.S. 678 (2001); *Nadarajah v. Gonzalez*, 443 F.3d 1069 (9th Cir. 2006).

26 **ORDER TO SHOW CAUSE**

27 Having reviewed Petitioner's claims, the Court finds that summary dismissal of the petition
28 is unwarranted at this time. *See Kourteva v. INS*, 151 F. Supp. 2d 1126, 1128 (N.D. Cal. 2001)

1 (“Summary dismissal is appropriate only where the allegations in the petition are vague or conclusory,
2 palpably incredible, or patently frivolous or false.”). Accordingly, Respondents are **ORDERED TO**
3 **SHOW CAUSE** why the petition should not be granted by:

4 (1) filing a written return no later than **Tuesday, May 29, 2007**.

5 (2) filing copies of all documents, orders and transcripts relevant to the petition; and

6 (3) filing a memorandum of law and fact fully stating Respondents’ position and making
7 a recommendation regarding the need for an evidentiary hearing on the petition.

8 If Petitioner wishes to reply to the return, he may do so by way of a traverse filed no later than
9 **Friday, June 15, 2007**.

10 **MOTION FOR APPOINTMENT OF COUNSEL**

11 18 U.S.C. § 3006A(a)(2)(B) provides that “[w]henver the United States magistrate or the
12 court determines that the interests of justice so require, representation may be provided for any
13 financially eligible person who . . . (B) is seeking relief under section 2241” “The purpose of
14 section 3006A is to provide for appointed counsel whenever required if failure to do so amounts to
15 a denial of due process.” *Gray v. Kernan*, No. C-92-3379-DLJ, 1993 U.S. Dist. LEXIS 2113, *10-12
16 (N.D. Cal. Feb. 16, 1993); *citing Chaney v. Lewis*, 801 F.2d 1191, 1196 (9th Cir. 1986). Unless an
17 evidentiary hearing is required, appointment of counsel pursuant to 18 U.S.C. § 3006A(a)(2)(B) is in
18 the discretion of the district court. *Terrovona v. Kincheloe*, 912 F.2d 1176, 1181-82 (9th Cir. 1990).
19 In deciding whether to appoint counsel, the district court “must evaluate the likelihood of success on
20 the merits as well as the ability of the petitioner to articulate his claims *pro se* in light of the
21 complexity of the legal issues involved.” *Gutierrez v. Flannican*, No. CIV 05-2981 PHX DGC
22 (DKD), 2005 U.S. Dist. LEXIS 31984, *1-2 (D. Ariz. Dec. 7, 2005); *citing Weygandt v. Look*, 718
23 F.2d 952, 954 (9th Cir. 1983).

24 **A. Likelihood of Success on the Merits**

25 Petitioner has been subject to a final order of removal since July 22, 2006, yet has been held
26 beyond the six month presumptively reasonable time period articulated in *Zadvydas v. Davis*, 533 U.S.
27 678, 701 (2001). As of yet, the United States has not received travel documents that would permit
28 Petitioner to return to Sudan, and it appears that regional conflict in Sudan could make impossible the

1 receipt by the United States of the necessary travel documents in the reasonably foreseeable future.
2 *See Ma v. Ashcroft*, 257 F.3d 1095, 1005 (9th Cir. 2001) (when there is no reasonable likelihood that
3 a foreign government will accept a removable alien's return in the reasonably foreseeable future, the
4 removable alien may not be held by the United States for more than a reasonable period beyond the
5 removal period). In addition, the United States cannot effectuate Petitioner's removal to a country
6 other than Sudan under 8 U.S.C. § 1231(b)(2)(E)(iii) because Petitioner did not reside in a country
7 other than Sudan before entering the United States. Under the facts as alleged in the Petition for Writ
8 of Habeas Corpus, the Court concludes that Petitioner has demonstrated a likelihood of success on the
9 merits.

10 **B. Complexity of Legal Issues**

11 The complexity of immigration and habeas law highlights the potential benefits of appointed
12 counsel in these proceedings. Indeed, the Court of Appeal for the Ninth Circuit has declared that
13 "[w]ith only a small degree of hyperbole, the immigration laws have been deemed second only to the
14 Internal Revenue Code in complexity." *United States v. Ahumada-Aguilar*, 295 F.3d 943, 950 (9th
15 Cir. 2002). Furthermore, assuming the Court grants the Petition for Writ of Habeas Corpus, there will
16 be a period of supervised release which involves 8 U.S.C. § 1231's complex statutory scheme. *See*
17 *Ma*, 257 F.3d at 1104-05. The Court concludes that the issues presented are sufficiently complex to
18 warrant appointment of counsel, particularly in light of the fact that Petitioner has had no formal
19 education or training in the United States.

20 After reviewing the Petition for Writ of Habeas Corpus and the accompanying declaration, and
21 in recognition of the potential need for an evidentiary hearing, the Court concludes that appointment
22 of counsel is warranted at this time. The motion for appointment of counsel (Docs. # 3, 1-2) is
23 GRANTED. The Court appoints Federal Defenders, Inc. as Petitioner's counsel in this case.

24 **IT IS SO ORDERED.**

25 DATED: May 1, 2007

26 
27 WILLIAM Q. HAYES
28 United States District Judge

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

APPENDIX B

FILED
06 FEB 15 PM 2:36
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY: *[Signature]* DEPUTY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ARUTYUN BALTAYAN,

Petitioner,

vs.

MICHAEL CHERTOFF, Secretary of the
Department of Homeland Security, et al.,

Respondents.

CASE NO. 06CV305 -IEG (BLM)

**ORDER (1) GRANTING
PETITIONER'S MOTION FOR
APPOINTMENT OF COUNSEL; (2)
GRANTING PETITIONER *IN FORMA*
PAUPERIS STATUS and (3)
DIRECTING RESPONDENTS TO
SHOW CAUSE WHY PETITIONER'S
REQUEST FOR HABEAS CORPUS
RELIEF PURSUANT TO 28 U.S.C. §
2241 SHOULD NOT BE GRANTED**

On February 9, 2006, Arutyun Baltayan, ("petitioner") filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 challenging his detention by respondents Michael Chertoff, Secretary, Department of Homeland Security; Alberto Gonzales, Attorney General; Ron Smith, Director of San Diego Field Office, U.S. Immigration and Customs Enforcement; and Michael McGee, Officer-in-Charge (collectively "respondents" or the "government").

On that same day, petitioner filed a motion for appointment of counsel pursuant to 18 U.S.C. § 3006A. Section 3006A(a)(2)(b) provides that when the Court determines that "the interests of justice so require," the Court may appoint counsel for financially eligible individuals who are seeking relief under section 2241. The Court finds that the appointment of counsel is appropriate in this case. Federal Defenders of San Diego, Inc., has requested to be appointed to represent petitioner in this matter. The Court therefore **GRANTS** petitioner's motion for

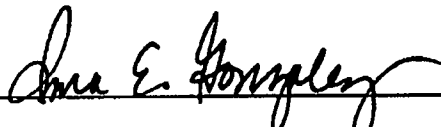
1 appointment of counsel and **APPOINTS** Federal Defenders of San Diego, Inc. to represent him.

2 On the same day, petitioner filed a motion to proceed *in forma pauperis* under 28 U.S.C. §
3 1915. Having reviewed petitioner's application and good cause appearing, the Court **GRANTS**
4 petitioner *in forma pauperis* status.

5 Furthermore, upon receipt of the petition, and finding that the matter is not appropriate for
6 summary disposition, the Court **ORDERS** respondents to show cause why the petition should not
7 be granted. Respondents shall have until **Monday, March 13, 2006**, to file and personally serve
8 an answer to the petition. Petitioner may file a traverse by no later than **Monday, April 3, 2006**.
9 Unless the Court orders otherwise, the matter will be taken under submission and decided without
10 oral argument. Local Rule 7.1(d)(1).

11 **IT IS SO ORDERED.**

12
13 Dated: 2/14/06


14 HON. IRMA E. GONZALEZ, Chief Judge
15 United States District Court
16
17
18
19
20
21
22
23
24
25
26
27
28

APPENDIX C

FILED
06 JAN 31 PM 1:40
CLERK U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY: [Signature] DEPUTY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

LUIS FELIPE CASAS CASTRILLON,

Petitioner,

vs.

DEPARTMENT OF HOMELAND
SECURITY, et al.,

Respondents.

CASE NO. 05CV1552-BEN (NLS)

**ORDER APPOINTING COUNSEL
(Docket No. 2)**

Petitioner, LUIS FELIPE CASAS CASTRILLON ("Petitioner"), a citizen of Colombia, has filed a petition for a writ of habeas corpus ("Petition") pursuant to 28 U.S.C. § 2241.¹ He claims the Department of Homeland Security has custody of his person in violation of 8 U.S.C. § 1231(a)(6). Petitioner now requests appointment of counsel pursuant to 18 U.S.C. § 3006A. For the reasons that follow, the Court **GRANTS** Petitioner's request and appoints Ms. Lori B. Schoenberg from the Federal Defenders of San Diego as counsel.

"Section 3006A(g) provides that counsel may be appointed for an impoverished habeas

¹ "The relevant statute, 28 U.S.C. § 2241, provides that a writ of habeas corpus shall only be granted if 'a prisoner' is in custody under the authority of the United States 'in violation of the Constitution or laws or treaties of the United States.' Although the statute is commonly used by federal prisoners detained on criminal charges, it has also been employed, both historically and in its current form, by aliens detained for immigration law enforcement purposes." Armentero v. I.N.S., 340 F.3d 1058, 1061 (9th Cir. 2003); see also, Zadvydas v. Davis, 533 U.S. 688 (2001) ("We conclude that § 2241 habeas corpus proceedings remain available as a forum for statutory and constitutional challenges to post-removal-period detention.").

petitioner whenever 'the court determines that the interests of justice so require' . . . " Bashor v. Risley, 730 F.2d 1228, 1234 (9th Cir. 1984), quoting, 18 U.S.C. § 3006A(g); Chaney v. Lewis, 801 F.2d 1191, 1196 (9th Cir. 1986) ("The district court has discretion to appoint counsel for indigents when it determines that the interests of justice so require.") The Court "must evaluate both the likelihood of success on the merits and the ability of the petitioner to articulate his claims pro se in light of the complexity of the legal issues involved." Rand v. Rowland, 113 F.3d 1520, 1525 (9th Cir. 1997) (Citations omitted); see also, Abdullah v. Norris, 18 F.3d 571, 573 (8th Cir. 1994) (The Court "should consider the legal complexity of the case, the factual complexity of the case, the petitioner's ability to investigate and present his claim, and any other relevant factors.").

It is likely that Petitioner will prevail on his claim. See, Rand v. Rowland, 113 F.3d at 1525. Petitioner claims that he is detained in violation of 8 U.S.C. § 1231(a)(6). The Supreme Court has held that a post-removal detention exceeding six months is presumptively unreasonable. See, Zadvydas v. Davis, 533 U.S. at 701 ("[O]nce the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing."); see also, Arango Marquez v. I.N.S., 346 F.3d 892, 898 -899 (9th Cir. 2003) ("Section 1231(a)(6) does not authorize indefinite post-removal period detention, but instead imposes an implied six-month limit on such detention, provided that removal is not reasonably foreseeable."). According to the Petitioner, he was ordered removed in January 2002 and his removal became final in July 2002. Zadvydas's six months limitation period in Petitioner's case expired in or about January 2003. There is no indication that since Petitioner has been in custody Respondents has attempted to remove him back to Colombia. Petitioner thus has shown that there "is no significant likelihood of removal in the reasonably foreseeable future." Zadvydas v. Davis, 533 U.S. at 701.

In addition, Petitioner is incapable of articulating his claims pro se. The case involves complex Constitutional and statutory analysis, and interpretation of Supreme Court precedent. Also, Petitioner's potential release would require, among other things, complex negotiations regarding release terms and bond amounts. See, Bonin v. Vasquez, 999 F.2d 425, 429 (9th Cir. 1993) ("[A]ppointment of counsel is necessary to prevent due process violations from occurring.").

1 Finally, Petitioner cannot afford to retain counsel as he has no income or assets. (Motion at 1.)
2 This, coupled with complexity of the issues presented, also renders appointment of counsel
3 appropriate.

4 For reasons set forth above, Petitioner's request for appointment of counsel is **GRANTED**.
5 The Court appoints Federal Defenders, Inc. (Ms. Lori B. Schoenberg) as counsel.

6
7 DATED: 1/30/06


8 ROGER T. BENITEZ
United States District Judge

9 cc: All parties and respective counsel

10 Federal Defenders of San Diego, Inc. (Ms. Lori B. Schoenberg)
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

APPENDIX D

FILED

06 AUG -8 AM 10:23

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BY:

DEPUTY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

AROLDO SUAREZ-TORRES,

Petitioner,

v.

MICHAEL CHERTOFF, Secretary of
the Department of Homeland
Security; ALBERTO GONZALES,
Attorney General of the United States;
RON SMITH, Director of San Diego
Field Office, Bureau of Immigration
and Customs Enforcement, and TONY
CERONE, Officer-in-Charge,

Respondents.

CASE NO: 06-CV-1444 W
(WMC)

ORDER GRANTING
REQUEST FOR
APPOINTMENT OF
COUNSEL

On July 17, 2006 Petitioner Aroldo Suarez-Torres ("Petitioner"), a detainee in the custody of the Department of Homeland Security, Bureau of Immigration and Customs Enforcement, proceeding *pro se*, commenced this Petition for habeas relief under 28 U.S.C. § 2241. Petitioner now seeks appointment of counsel. For the reasons outlined below, the Court GRANTS Petitioner's request.

I. REQUEST FOR APPOINTMENT OF COUNSEL

The Court may appoint counsel for financially eligible persons seeking habeas

Tman

1 relief if "the interests of justice so require." 28 U.S.C. § 3006A (a)(2)(B). "In deciding
2 whether to appoint counsel in a habeas proceeding, the district court must evaluate the
3 likelihood of success on the merits as well as the ability of the petitioner to articulate
4 his claims pro se in light of the complexity of the legal issues involved." Weygandt v.
5 Look, 718 F.2d 952, 954 (9th Cir. 1983); see also Rand v. Rowland, 113 F.3d 1520,
6 1525 (9th Cir. 1997). Additionally, appointed counsel is mandated when (1) necessary
7 for effective discovery, or (2) an evidentiary hearing may occur. Weygandt, 718 F.2d
8 at 954.

9 A. LIKELIHOOD OF SUCCESS ON THE MERITS

10 The Court must first determine Petitioner's likelihood of success on the merits.
11 The United States Supreme Court has stated that a detention of more than six months
12 beyond the post-removal period is presumptively unreasonable. Zadvydas v. Davis, 533
13 U.S. 678, 701 (2001). At that point, "once the alien provides good reason to believe
14 that there is no significant likelihood of removal in the reasonably foreseeable future,
15 the Government must respond with evidence sufficient to rebut that showing." Id.

16 Here, Petitioner fled Cuba by boat in 1980 and was paroled into the U.S. as a
17 "Mariel" refugee from Cuba. Petition at 1. In 1982, Petitioner was ordered deported
18 to Cuba and initially entered Respondent's custody at that time, remaining in detention
19 for two years. (Id. at 2.) He was later returned to custody in 1995 and remained in
20 immigration detention for eight years, being released in 2003. (Id.)

21 Petitioner was subsequently returned to the custody of U.S. Immigration and
22 Customs Enforcement ("ICE") on December 27, 2005. He has remained in ICE
23 custody since that date. ICE conducted a Post-Order Custody Review of Petitioner's
24 detention pursuant to 8 C.F.R. §241.4 in April 2006. ICE informed the Petitioner that
25 he would not be released from custody pending removal or further review by the
26 Headquarters Post-Order Detention Unit. His custody review by Headquarters was
27 scheduled to be held on or about June 27, 2006. He is currently in custody.

28 As such, the 180-day post-removal period expired on or before June 25, 2006

1 from Petitioner's last detention on December 27, 2005. Moreover, the evidence
2 suggests that Petitioner's native country, Cuba, will not enable removal. During the
3 twenty-four year period in which Petitioner has been awaiting removal, including a total
4 of over ten years in physical custody of federal immigration officials, the United States
5 government has not received travel documents that would permit the Petitioner's
6 repatriation to Cuba. See Petition at 2. On this evidence, the Court finds that
7 Petitioner has satisfied his burden and demonstrated to the Court's satisfaction that
8 there "is no significant likelihood of removal in the reasonably foreseeable future."
9 Zadvvydas, 533 U.S. at 701. Therefore, Petitioner has demonstrated a high likelihood
10 of success on the merits.

11 B. COMPLEXITY OF LEGAL ISSUES

12 Next, the Court must determine whether Petitioner is capable of articulating his
13 claims *pro se* in light of the case's complexity. The Court finds that Petitioner is
14 incapable of adequately articulating these claims *pro se* for several reasons. First, the
15 case involves Constitutional analysis, complex statutory analysis, principles of
16 jurisdiction, and administrative procedure. Second, an analysis of immigration law is
17 required and the Ninth Circuit has declared that "[w]ith only a small degree of
18 hyperbole, the immigration laws have been deemed second only to the Internal
19 Revenue Code in complexity." United States v Ahumada-Aguilar, 295 F.3d 943, 950
20 (9th Cir. 2002)(citations and internal quotes omitted). Therefore, it is unlikely
21 Petitioner could "thread the labyrinth" of immigration law without an attorney. *Id.*
22 Third, Petitioner's potential supervised release would require complex negotiations
23 regarding release terms, bond amounts, and other considerations. Finally, Petitioner's
24 education compels appointed counsel. Petitioner has no education, or background in
25 legal affairs, and cannot read English. See Fife Declaration. ¶¶ 15-16. In light of
26 Petitioner's background, coupled with the complexity of the legal issues presented in
27 this case, the Court finds that appointed counsel is appropriate.

28 //

1 C. DISCOVERY CONSIDERATIONS


2 In order to effectively litigate his habeas claim, Petitioner will need access to his
3 Bureau of Immigration and Customs Enforcement file. To accomplish this goal,
4 Petitioner must (1) be able to effectively use discovery procedures, as well as (2) be
5 capable of interpreting the documents when they arrive. An evidentiary hearing may
6 be required to give the government an opportunity to rebut Petitioner's contention that
7 his removal to Cuba is not likely in the reasonably foreseeable future and Petitioner
8 lacks sufficient legal background to advocate for himself during a contested motion
9 hearing. In light of the mandate set forth in Weygandt, as well as the considerations
10 described above, the Court is obligated to appoint counsel to effectively allow proper
11 discovery in this case.

12 II. CONCLUSION

13 In light of the foregoing, the Court **GRANTS** Petitioner's request for
14 appointment of counsel. The Court appoints Federal Defenders, Inc. (James Fife) as
15 Petitioner's counsel in this case.

16
17 IT IS SO ORDERED.

18
19 DATE: August 4, 2006


HON. THOMAS J. WHELAN
United States District Court
Southern District of California

20
21
22
23
24 CC: ALL PARTIES OF RECORD

25
26 FEDERAL DEFENDERS INC.

27 ATTN: JAMES FIFE

28